SUPREME COURT, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DARRYL J. ROBERTS,
Petitioner,

v.

BEULAH B. WOOTON, ADMINISTRATRIX
OF THE ESTATE OF ROBERT O. WOOTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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47108

QUESTION PRESENTED

Beulah B. Wooton, as administratrix of the Estate of Robert O. Wooton, filed a complaint in 1994 on a cause of action that arose in 1972. In the Circuit Court of Raleigh County, West Virginia, Darryl J. Roberts, a resident of Arizona, made a motion for directed verdict at the end of the Wooton's case for the circuit court to find that the Wooton's claim was time barred by all possible statutes of limitations. The circuit court granted this motion. The Supreme Court of Appeals of West Virginia reversed the directed verdict and remanded the case back to the circuit court.

Has the Supreme Court of Appeals of West Virginia denied Petitioner his due process right to a meaningful hearing as required under the Fourteenth Amendment of the United States Constitution because it refused to enforce the statute of limitations which vested in him the right to a complete defense to a claim at least twenty-two years old and because it created an exception to the statute where none was provided by the legislature by remanding a case in which Respondent presented no evidence to justify tolling the limitations period.

PARTIES TO THE PROCEEDING

Petitioner

Darryl J. Roberts

Respondent

Beulah B. Wooton, Administratrix of the Estate of Robert O. Wooton

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PETITION FOR WRIT OF CERTIORARI

Darryl J. Roberts respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Appeals of West Virginia entered in this proceeding on August 9, 1999, in order to decide whether the Supreme Court of Appeals of West Virginia has violated his constitutional right to due process under the Fourteen Amendment of the United States Constitution.

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia that gives rise to this petition was entered on August 9, 1999. This order is reprinted in the Appendix at Appendix A at 1a-3a. The opinion underlying this order will be published in the South Eastern Reporter, Second Edition, and a copy of the opinion is reprinted in the Appendix at Appendix B at 4a-16a. The final order of the Circuit Court of Raleigh County ordered the Petitioner's motion for directed verdict be granted. This order is reprinted in the Appendix at Appendix C at 17a-23a.

JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days of the Supreme Court of Appeals of West Virginia's order entered August 9, 1999. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const., amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. Code § 55-2-12

Every personal action for which no limitations otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

STATEMENT OF THE CASE

The crux of this case is the State's interpretation of West Virginia's statute of limitations found in W. Va. Code § 55-2-12 and the established rules of law construing the word "accrued" within that statute. The parties to this case agree that the applicable statute of limitations dictates that the cause of action shall be brought "[w]ithin two years next after the right to bring the same shall have accrued." W. Va. Code § 55-2-12. West Virginia has defined the point at which the cause of action shall have "accrued" in the following manner:

> Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the "discovery rule," the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of the claim." App. B at 5a (citing Syllabus Point 2, Gaither v. City Hosp., Inc., 487 S.E.2d 901 (1997)).
>
> The "discovery rule" is generally applicable to all torts, unless there is a clear statutory prohibition of its application." App. B at 5a (citing Syllabus Point 3, Gaither v. City Hosp., Inc., 487 S.E.2d 901 (1997)).
>
> Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." App. B at 5a (citing Syllabus Point 3, Cart v. Marcum, 423 S.E2d 644 (1992)).

The facts center around Robert Wooton's, as an employee of Associated Cemetery Estates, Inc.[1] ("ACE"), being offered the opportunity to purchase 400 shares ("Shares") of ACE stock by Chester Roberts, a primary owner of ACE. App. B at 7a. Robert Wooton accepted this offer on January 4, 1960, and signed a promissory note

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[1] Legacy One is the successor corporation to ACE.

("Note") to pay for the Shares. Id. The Note promised the payment of $8,000.00 in ten equal installments at an annual interest rate of four percent, and the Shares were held by Chester Roberts as collateral for the Note. Id. at 8a. Robert Wooton died on March 8, 1969. Id.

On October 8, 1971, Beulah Wooton, the widow of Robert Wooton, received a letter from Chester Roberts informing her that her husband had been in default of the Note at the time of his death for failure to make payment and offering a check in the amount of $4,000.00 to purchase the equity in the Shares. Id. Beulah Wooton did not cash or return the check. Id.

On March 27, 1972, Chester Roberts informed the secretary of ACE that he had purchased Robert Wooton's Shares and requested a new stock certificate to be issued in his name for the Shares. Id. at 8a. The secretary issued this new certificate, which Chester Roberts then gifted to Darryl Roberts, his son and a resident of Arizona, in 1976. Id. at 9a. Chester Roberts died in 1980. Id. Darryl Roberts subsequently gifted these Shares to his wife in 1987, and they were sold to Stewart Enterprises, Inc. in 1994.

Upon his father's death, Darryl Roberts became president and chief executive officer of ACE, and in January 1985, Darryl Roberts sent a letter to Bill Wooton. Id. at 9a; App. E at 27a. Bill Wooton is one of the sons of Robert Wooton, a West Virginia State Senator and Chairman of the West Virginia Senate Finance Committee. In the letter, Darryl Roberts discussed his father's purchase of the Shares and Robert Wooton's default on the Note. App. E at 27a. Darryl Roberts also renewed his father's offer to pay $4,000.00 plus five percent per year since his father's offer was first made. App. B at 9a; App. E at 28a. Bill Wooton

forwarded this offer to his brother, James Wooton, also an attorney. App. B at 9a. James Wooton responded with a counter-offer; Darryl Roberts rejected the counter-offer and reinstated his previous offer. Id.

On June 3, 1986, Bill Wooton acquired shares of ACE, now Legacy One. Id. He then executed under oath a Legacy One Shareholders' Agreement which was by and between Legacy One and all the Shareholders. Id. at 10a; App. D at 24a-26a. A provision of the Agreement listed all the shareholders' names. Id. Neither Robert Wooton's name nor his estate's was on this agreement. Id.

Settlement negotiations continued through 1994. In November 1994, Beulah Wooton was named Administratrix of Robert Wooton's estate, and she filed a complaint against Darryl Roberts and Legacy One. App. B at 10a. At the close of the Respondent's case, Petitioner and Legacy One moved for directed verdict based on the running of the statutes of limitations. The judge of the Circuit Court of Raleigh County granted the motion finding that Respondent knew or should have known of the causes of action as of March 27, 1972, the date Chester Roberts took ownership of the Shares. App. C at 23a.

In his order the judge made the following findings of fact and conclusions of law. Although the correspondence in 1971 put Beulah Wooton on notice that her husband had been in default, March 27, 1972, was the critical date, as that was the date the Shares had been transferred to Chester Roberts. Id. at 19a. From that date, Beulah Wooton was on notice that the transfer had occurred because she did not enjoy any of the benefits associated with possession of the Shares and she had nothing that would indicate ownership or possession of the Shares. Id. at 20a. For example, she never received

notice of shareholders' meetings and she never received any dividend checks. Id. Although she claimed that she believed that dividends were being applied directly to the Note, this did not create an issue of fact as to whether she should have known that the Shares had been transferred. Id. at 20a-21a. The common law rules of discovery state that lack of action, lack of interest, or misunderstanding of the law does not create a discovery issue. Id. at 21a. For thirteen years and until 1985, the Wootons paid no attention to the Shares. When Darryl Roberts succeeded his father as president at ACE, he had to reconstruct the events that took place when Robert Wooton and Chester Roberts were alive. Id. at 21a; App. E at 27a. In 1985 and upon contact by Darryl Roberts, the Wootons began to make inquiries into the Shares, and James Wooton acted as agent to Beulah Wooton in settlement negotiations. App. C at 22a. James Wooton possessed enough information to know that either Chester Roberts or ACE had done something with the Shares. Id. The common law rules of discovery hold that mere ignorance of the existence of the cause of action or the identity of the wrongdoer does not prevent the running of the statute of limitations. Id. The discovery rule applies only when there is a strong showing that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury. Id. at 22a-23a. Because the court found no element of fraud nor any issue of fact that permitted the application of the discovery rule, the circuit court judge held that the statute of limitations had run and directed verdicts in favor of the Petitioner and Legacy One. Id. at 23a.

The Supreme Court of Appeals of West Virginia cited the same common law rules of discovery as the circuit court. It also cited the common law rule found in Syllabus Point 3, Stemple v. Dobson, 400 S.E.2d 561 (1990), that

> Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.

App. B at 5a. Although the judge of the Circuit Court of Raleigh County found that the Respondent did not present even a scintilla of evidence that Petitioner or Legacy One did something to prevent Respondent from knowing or inquiring into the status of the Shares, thus not presenting evidence sufficient to invoke the common law rule of discovery, App. C at 23a, the Supreme Court of Appeals of West Virginia found that the jury should decide the point in time when Respondent should have known that Petitioner claimed ownership of the Shares. App. B at 16a. Therefore, the Supreme Court of Appeals of West Virginia reversed the directed verdicts and remanded the case. App. A at 1a- 3a.

REASONS FOR GRANTING THE WRIT

The order of the Supreme Court of Appeals of West Virginia has violated the due process rights of Petitioner because it denied him the right to a meaningful hearing by refusing to enforce the statute of limitations as intended by the West Virginia State Legislature.

The order of the Supreme Court of Appeals of West Virginia violated Petitioner's constitutional right to due process of law under the Fourteenth Amendment of the United States Constitution because it refused to follow the well-

established statute of limitations. Certiorari is appropriate here because this refusal denied Petitioner the right to a hearing granted at a meaningful time and in a meaningful way appropriate to the nature of the case.

Although the concept of statutes of limitations is consistent with due process of law, these statutes must be enforced with consistency and with certainty. Courts are not permitted to selectively enforce statutes of limitations, and they are not permitted to make exceptions where none existed in the statute. To do so is to violate due process of law.

The enforcement of statutes of limitations is consistent with due process of law, because the states have an interest in providing repose to potential defendants and avoiding stale claims. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988). In the words of this Court:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary and their operation does not discriminate between the just and the unjust claim or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). See also Wilson v. Garcia, 471 U.S. 261, 271 (1985) ("In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.").

However, statutes of limitations do have constitutional constraints. First, to comply with due process of law, the states must enact statutes of limitations which are reasonable and certain. Logan, 455 U.S. at 437; Wilson, 471 U.S. at 261. This Court has held that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson, 471 U.S. at 266 (citing Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). This Court explained that without certainty "[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." Wilson, 471 U.S. at 271, n.34.

Second, states, through their courts, may not find exceptions to the statutes of limitations that have not been enacted by the legislature. Even though the results of an individual case under the applicable statute of limitations may be harsh, the courts may not make an exception to the law. Scaife Co. v. Comm'r. of Internal Revenue, 314 U.S. 459, 463. It has been the rule since 1817 that where the legislature has made no exception, the courts can make none. M'Iver v. Ragan, 15 U.S. 25, 29, 30 (1817); The President and Dirs. of the Bank of the State of Alabama v. Dalton, 50 U.S. 522 (1850).

Finally, once a state has established a statute of limitations, it may not revoke it without notice. Texaco, Inc. v. Short v. Walden, 454 U.S. 516, 534 (1982). It has long been established that the right to assert statutes of limitations as a complete defense becomes a vested right within the

protection of the constitutional guaranty of due process of law. 51 Am. Jur. 2d Limitation of Actions § 4 (1970); Bd. of Educ. of Normal School Dist. v. Blodgett, 40 N.E. 1025, 1026 (Ill. 1895). Because "due process of law" and "law of the land" are one in the same, due process requires that laws that are in effect must be enforced. Id. at 1026. See also Walter Butler Bldg Co. v. Soto, 97 S.E.2d 275, 287 (W. Va. 1957). And the courts must enforce the law in a manner consistent with the intent and the word of the legislature. In the words of even the Supreme Court of Appeals of West Virginia:

> It is the duty of the courts to give a statute the interpretation called for by its language when this can reasonably be done . . . . It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded.

State v. General Daniel Morgan Post No., 548, V.F.W., 107 S.E.2d 353 (W. Va. 1959). See also State v. C.H. Musselman Co., 59 S.E.2d 472, 477-78 (W. Va. 1950).

The bottom line is that due process of law requires that parties must be provided "an opportunity . . . granted at a meaningful time and in a meaningful way for a hearing appropriate to the nature of the case." Logan, 455 U.S. at 437 (citations omitted). When these basic requirements are respected, "[t]he State's limited involvement in the running of the time period generally falls short of constituting the type of

state action required to implicate the protections of the Due Process Clause." Tulsa Prof'l. Collection Servs., Inc., 485 U.S. at 486. However, the State of West Virginia became involved in significant state action when it chose to ignore the statute of limitations in its order below.

The State of West Virginia has complied with the requirements of enacting a reasonable and certain statute of limitations. West Virginia Code § 55-2-12 states that "[e]very personal action for which no limitations otherwise prescribed shall be brought . . . [w]ithin two years next after the right to bring the same shall have accrued, if it be for damage to property." The Supreme Court of Appeals of West Virginia has given "accrued" appropriate construction. A cause of action accrues when the injury occurs, unless the statute is tolled until the claimant knows or by reasonable diligence should know of the claim. App. B at 5a (citing Syllabus Point 2, Gaither v. City Hosp. Inc., 487 S.E.2d 901 (W. Va. 1997)). However, mere ignorance of the existence is not reason to toll the statute; discovery applies only when the claimant has made a strong showing that the defendant has prevented claimant from learning of the injury. Id. (citing Syllabus Point 3, Cart v. Marcum, 423 S.E.2d 644 (W. Va. 1992)). If the cause of action is based on fraud, when the claimant knows or by reasonable diligence should know is a question for the jury. Id. (citing Syllabus Point 3, Stemple v. Dobson, 400 S.E.2d 561 (W. Va. 1990)).

Until the Supreme Court of Appeals of West Virginia issued its order below, the statute and the court's interpretation of the statute were also certain and reasonable. The parties agreed to the two-year statute of limitations; the Circuit Court of Raleigh County applied the same discovery rules cited in the opinion of the Supreme Court of Appeals of West Virginia. While the circuit court found that Respondent

had presented no evidence sufficient to raise the issue of discovery, the Supreme Court of Appeals of West Virginia remanded this case to permit the Respondent to retry her case and contrive evidence of fraud against the Petitioner where no evidence existed before.

In issuing its order below the Supreme Court of Appeals of West Virginia has attempted to make an exception to the statute established by the West Virginia Legislature. In doing so, the State has attempted to destroy the concept of statutes of limitations and deprive Petitioner, a citizen of another state, of due process of law by denying him his right to defend his property at a hearing held at a meaningful time and in a meaningful way. The people who had first hand knowledge of the events giving rise to the cause of action have passed away: Robert Wooton, the maker of the Note, died twenty-five years prior to the filing of the complaint and Chester Roberts, the holder of the Note, died fourteen years before the filing of the complaint. App. B at 8a, 9a. Respondent had reason to investigate the title of the assets of her husband's estate upon his death and certainly upon contact by Chester Roberts, notifying her of Robert Wooton's default on the Note. Id. at 8a. Instead, she chose to neglect any right the estate may have had to the Shares. After Chester Roberts' death and fourteen years after Chester Roberts first contacted Respondent, Petitioner was left to reconstruct the events of which he had no direct knowledge. Although he was not in possession of all the facts, Petitioner wrote a letter to Bill Wooton, the son of Respondent who is a West Virginia State Senator and Chairman of the West Virginia Senate Finance Committee, in an attempt to resolve the issues surrounding the Shares. App. E at 27a. This letter clearly stated that Chester Roberts claimed possession of the Shares. Id. Bill Wooton shared this information with his brother, James Wooton, who acted as agent for the Respondent. App. C at 22a. Again, the

Respondent neglected any right the estate may have had to the Shares. Then in 1986, Bill Wooton executed a Shareholders' Agreement, which on the front page listed all the shareholders of Legacy One. App. D at 24a-25a. The name of Robert Wooton or the Estate of Robert Wooton is clearly not contained in this list. Id. Twenty-two years after Chester Roberts claimed ownership of the Shares and nine years after Petitioner again asserted his father's claim to the Shares, Respondent decided to file a cause of action.

West Virginia has well-established rules for the tolling of statutes of limitations: the plaintiff in a case must produce evidence of a "strong showing that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." The circuit court found that, not only did she not make a "strong showing," Respondent produced no evidence to invoke the discovery rules. App. C at 23a. Conversely, Petitioner produced overwhelming evidence that the Respondent knew or should have known that Chester Roberts claimed ownership of the Shares. Petitioner directly told the Respondent through her agent that his father acquired the Shares in 1985. App. E at 27a. Even though the point in time from which the statute of limitations begins to run is a question for the jury in causes of action based on tort or fraud, Respondent must produce evidence sufficient to give the question to the jury. Again, the circuit court clearly found that the Respondent did not produce even a scintilla of evidence to invoke the discovery rules. App. C at 23a. Now, the Supreme Court of Appeals has ordered this case to be remanded, giving Respondent the opportunity to retry the case and to attempt to produce such sufficient evidence. App. A at 1a-3a. This state action is in violation of Petitioner's right to due process of law.

CONCLUSION

Because at least twenty-two years passed between the cause of action arising and the complaint being filed and the Respondent presented no evidence that either Petitioner or Legacy One prevented Respondent from knowing or learning that the Shares had been transferred, the Supreme Court of Appeals of West Virginia has issued an order in contravention to the mandates of the West Virginia State Legislature. It has created an exception to the rule where none was provided by the State Legislature. In doing so, the State has required the citizen of another state to defend a claim so stale that witnesses have indeed died, memories have certainly faded and evidence has surely been lost. By neglecting her claim for twenty-two years, Respondent has waived her right to litigate. Instead of refusing this cause of action, the State has resurrected it, permitting the Respondent to retry a case and present evidence where none existed before. For these reasons heretofore stated, the State of West Virginia has deprived Petitioner of due process of law under the Fourteenth Amendment of the United States Constitution; therefore, this Petition for Writ of Certiorari should be granted.

/s/_____
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APPENDIX A

[Court of Appeals Order - 8/9/99]
No. 25834

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

BEULAH B. WOOTON, ADMINISTRATRIX OF THE ESTATE OF ROBERT O. WOOTON,
Plaintiff Below, Appellant

v.

DARRYL J. ROBERTS AND LEGACY ONE, INC. (FKA ASSOCIATED CEMETERY ESTATES, INC.),
Defendants Below, Appellees

The Court having maturely considered the record and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the ruling of the Circuit Court of Raleigh County, rendered on 17th day of April, 1998. It is therefore considered and ordered by the Court that said ruling be, and it hereby is, set aside, reversed and annulled, and that the appellant, Beulah B. Wooton, Administratrix of the Estate of

Robert O. Wooton, do recover of and from the appellees, Darryl J. Roberts and Legacy One, Inc., (f/k/a Associated Cemetery Estates, Inc.), her costs about the prosecution of her appeal in this Court in her behalf expended. AND this action is remanded to the Circuit Court of Raleigh County for a trial wherein the jury should resolve the issue of whether the appellant's claims are barred by the statute of limitations as well as the appellant's allegations of breach of fiduciary duty, constructive fraud and unjust enrichment, all in accordance with the principles stated and directions given in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Raleigh County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid, prepared Per Curiam, was concurred in by Chief Justice Starcher and Justices Workman, Davis, Maynard and McGraw.

DONE IN VACATION of the Supreme Court of Appeals, this 9th day of August 1999.

Honorable Larry v. Starcher, Chief Justice

Honorable Margaret L. Workman

Honorable Robin Jean Davis

Honorable Elliot E. Maynard

Honorable Warren R. McGraw

Received the foregoing order this 9th day of August, 1999, and entered the same in Order Book No. 132.

A True Copy

Attest: /s/ Deborah L. McHenry
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Filed July 9, 1999]

Case No. 25834

BEULAH B. WOOTON, ADMINISTRATRIX OF THE ESTATE OF ROBERT O. WOOTON,
Plaintiff, Appellant

v.

DARRYL J. ROBERTS AND LEGACY ONE, INC. (FKA ASSOCIATED CEMETERY ESTATES, INC.),
Defendants, Appellees

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Civil Action No. 94-C-777-B

REVERSED AND REMANDED
Submitted: June 8, 1999

SYLLABUS BY THE COURT

1. "'Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of the claim.' Syllabus Point 1, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 2, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

2. "'The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application.' Syllabus Point 2, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 3, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

3. "Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the 'discovery rule' applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." Syllabus Point 3, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992).

4. "Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury." Syllabus Point 3, *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990).

5. "'"'Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syllabus, *Nichols v. Raleigh-Wyoming Coal Co.*, 112 W.Va. 85[, 163 S.E. 767 (1932).'" Point 1, Syllabus, *Jenkins v. Chatterton*, 143 W.Va. 250[, 100 S.E.2d 808] (1957).' Syl. Pt. 1, *Jividen v. Legg*, 161 W.Va. 769, 245 S.E.2d 835 (1978)." Syllabus Point 2, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

6. "The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syllabus Point 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Raleigh County entered on April 17, 1998. In that order, the circuit court directed verdicts in favor of the appellees and defendants below, Darryl J. Roberts and Legacy One, Inc., in an action filed by the plaintiff, Beulah Wooton, administratrix of the Estate of Robert Wooton, alleging breach of fiduciary duty and

constructive fraud with regard to corporate stock owned by her deceased husband. The circuit court found that the action, which was filed more than twenty years after the stock was allegedly transferred from the decedent's estate, was barred by the statute of limitations. In this appeal, the plaintiff contends that the circuit court erred by directing verdicts in favor of the appellees because she was entitled to the benefit of the "discovery rule."

This Court has before it the petition for appeal, the entire record, and briefs and argument of counsel. For the reasons set forth below, the final order of the circuit court is reversed and this case is remanded for further proceedings.

I.

Robert O. Wooton began working for Associated Cemetery Estates, Inc. (hereinafter "ACE" or "Legacy One"[1] in 1956. At that time, ACE, a cemetery and funeral home business, was owned by Chester and Marzetta Roberts. In 1959, ACE offered seven of its "key" employees the opportunity to purchase 400 shares of ACE stock. Robert Wooton was one of the employees to whom stock ownership was offered.

On January 4, 1960, stock was transferred to the ACE employees by a Stock Agreement. Pursuant to the agreement, each employee signed a promissory note to pay for his or her shares of stock. According to the plaintiff, she and her

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[1] Legacy One is the successor corporation to ACE.

husband understood that the stock would be paid for by future dividends and directors' fees.

The promissory note signed by Robert Wooton stated that he "promise[d] to pay to the order of Chester G. Roberts . . . Eight Thousand Dollars ($8,000.00) in Ten (10) equal installments." The obligation bore an annual interest rate of 4% and the share certificates were deposited as collateral security for the payment of the note. Thus, neither Robert Wooton nor any of the other ACE employees had physical possession of the stock certificates.

On March 8, 1969, Robert Wooton died. More than two years later, the plaintiff received a letter dated October 8, 1971, from Chester Roberts informing her that her husband had been in default under the terms of the promissory note at the time of his death because he had failed to make the scheduled principle and interest payments. The letter further stated that "[i]n accordance with our conversation of October 7, 1971,[2] I am enclosing a check in the amount of $4,000.00 to purchase Bob's estate equity in Certificates No. 7 and 18." After receiving this letter, the plaintiff informed Chester Roberts that his offer was inadequate. She neither cashed, nor returned the check.

On March 24, 1972, Chester Roberts sent a letter to ACE's secretary, Mary Frances Roop, informing her that he had purchased Robert Wooton's stock at a private sale. He requested that she issue a new stock certificate to him in the amount of 400 shares. The next day, Mary Roop issued a

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[2] The plaintiff has no recollection of any such conversation.

new certificate for 400 shares of ACE stock to Chester Roberts and canceled the certificates issued to Robert Wooton. Thereafter, Chester Roberts gave the stock he repurchased from Robert Wooton to his son, Darryl Roberts, as a Christmas present in 1976.

Chester Roberts died in 1980, and Darryl Roberts became the president and chief executive officer of ACE. In January 1985, Darryl Roberts approached Bill Wooton, one of Robert Wooton's sons, to discuss the status of his father's stock. At that time, Darryl Roberts stated that Robert Wooton had failed to make the required principal and interest payments on the note. He renewed his father's previous offer to buy the stock for $4000.00 plus an additional 5% interest per year since the initial offer was made.

Bill Wooton forwarded this information to his brother, James Wooton, who was living in Baltimore, Maryland, with a letter stating, "I believe they discontinued dividends at his death, even though daddy or his estate still owned the stock." James Wooton responded to Darryl Robert's offer with a counterproposal on February 7, 1985. Darryl Roberts rejected the counteroffer and simply reinstated his previous offer.

On June 3, 1986, Bill Wooton, who had acquired 9.25 shares of Legacy One stock in exchange for legal services previously rendered to an affiliate of ACE,[3] executed a Legacy One Shareholders Agreement.[4] The agreement listed

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[3] Bill Wooton is an attorney.

[4] In 1986, the assets and liabilities of ACE and a number of affiliates were transferred to Legacy One and the shareholders of

the names of all Legacy One shareholders as of May 28, 1986. Bill Wooton's name appeared on the document as owning 9.25 shares. However, neither Robert Wooton nor his estate's name appeared on the list as a shareholder. Bill Wooton later claimed that he executed the agreement without reading the document and without knowledge that his father was not included as a shareholder.

In the 1990s, various offers to settle the matter were made between Legacy One and James Wooton. On July 18, 1994, Legacy One made a final offer to settle the matter for $12,000.00. That offer was rejected.

On November 9, 1994, the plaintiff was named as Administratrix of Robert Wooton's Estate. She filed a complaint against Darryl Roberts and Legacy One on November 28, 1994, claiming, *inter alia,* breach of fiduciary duty and constructive fraud relating to her husband's stock. During the course of litigation, several summary judgment motions were filed by the appellees asserting that the plaintiff's claims were barred by the statute of limitations. These motions were denied.

The case proceeded to trial before a jury on March 24-26, 1998. At the close of the plaintiff's presentation of evidence, the appellees moved for directed verdicts pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure. They claimed that the plaintiff knew or should have been on notice by at least February 1985, that her husband's stock had been transferred. They further asserted that if the plaintiff

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ACE and the affiliates were issued stock in Legacy One.

had made a reasonable inquiry, she would have learned that the stock had been repurchased by Chester Roberts. Thus, the appellees maintained that the plaintiff failed to show that she was entitled to the benefit of the discovery rule, and therefore, her claims were barred by the statute of limitations.

The trial court accepted the arguments of the appellees, finding that the plaintiff had sufficient information by 1972 to know that something had happened to cause her not to have the enjoyment of possession of the stock. In addition, the trial court found that by 1985, the plaintiff's sons had the same knowledge. The trial court further found that the plaintiff had not offered sufficient evidence to create an issue of fact as to whether either of the appellees did something to prevent her from knowing or finding out what happened to her husband's stock. Thus, the court concluded that the discovery rule was not applicable and that there were no other issues of fact. Accordingly, the motions for directed verdicts were granted in favor of both appellees on all counts based on the statute of limitations. A final order reflecting the trial court's ruling was entered on April 17, 1998. This appeal followed.

II.

The plaintiff contends that the circuit court erred by directing verdicts for the appellees based on the statute of limitations. She maintains that the discovery rule applies and that she did not have notice of the stock transfer until 1994. In support of her assertions, the plaintiff has presented letters showing that the appellees made offers to purchase her husband's stock through the early 1990s. She contends that

the appellees did not claim ownership of the stock until 1994.

The parties basically agree that a two-year statute of limitations applies in this case.[5] "'Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.' Syllabus Point 1, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 2, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). "'The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application.' Syllabus Point 2, *Cart v. Marcum,* 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 3, *Gaitherv. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). However, we have recognized that there are some instances where the discovery rule should not be applied because the nature of the injury or wrong is such that a plaintiff could not reasonably claim ignorance of the existence of a cause of action. In that regard, we have held that:

Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.

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[5] Darryl Roberts concedes that a five year statute of limitations may apply to the plaintiff's claim of unjust enrichment and request for specific performance.

Syllabus Point 3, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992).

Relying upon our holding in Syllabus Point 3 of *Cart*, *supra*, the appellees assert that the plaintiff knew or should have been on notice by at least February 1985 that her husband's stock had been transferred. They assert that a reasonable inquiry by the plaintiff would have revealed this fact. Moreover, they contend that the plaintiff has failed to show that any actions on their part kept her from discovering that the stock had been transferred.

In Syllabus Point 3 of *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990), we held that:

> Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.

In *Stemple*, the plaintiffs brought an action for breach of contract and fraudulent concealment of termite damage against the former owners of their home. The circuit court granted summary judgment in favor of the defendants based on the statute of limitations. On appeal, this Court reversed the decision of the circuit court finding the issue of when the claim accrued for purposes of the statute of limitations was a question of fact for the jury.

In this case, the circuit court granted the appellees' motions pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure which provides:

(a) *Judgment as a matter of law.* -- (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In Syllabus Points 2 and 3 of *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996), this Court held that:

"'"Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syllabus, *Nichols v. Raleigh-Wyoming Coal Co.*, 112 W.Va. 85[, 163 S.E. 767 (1932)]."' Point 1, Syllabus, *Jenkins v. Chatterton*, 143 W.Va. 250[, 100 S.E.2d 808](1957)." Syl. Pt. 1, *Jividen v. Legg*, 161 W.Va. 769, 245 S.E.2d 835 (1978).

The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of

a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed.

Thus, in the case *sub judice,* we must determine whether the evidence presented by the plaintiff was sufficient to create a question of fact for the jury as to whether she was entitled to the benefit of the discovery rule. In other words, did the plaintiff offer evidence from which a reasonable jury could conclude that she did not know or had no reason to know that her husband's stock had been transferred prior to 1994.

After reviewing the record, we conclude that the plaintiff did offer sufficient evidence during the presentation of her case to create a question of fact for the jury regarding whether her claim was barred by the statute of limitations. We disagree with the circuit court's conclusion that because the plaintiff did not receive dividends after her husband's death, she had reason to know that something had happened to the stock. The plaintiff presented evidence indicating that she believed the stock was being paid for with the dividends and did not expect to collect them. More importantly, the plaintiff presented evidence that she received offers from the appellees to purchase her husband's stock through the 1990s. The plaintiff maintains that those offers gave her reason to believe that she still owned the stock. She contends that once the appellees claimed ownership of the stock in 1994, she timely filed suit. Considering these facts in the light most favorable to the plaintiff, we believe that the jury should have been given the opportunity to consider this evidence and

determine whether the plaintiff's claims are barred by the statute of limitations.

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Raleigh County is reversed and this case is remanded to the circuit court for trial. The jury should resolve the issue of whether the plaintiff's claims are barred by the statute of limitations as well as the plaintiff's allegations of breach of fiduciary duty, constructive fraud, and unjust enrichment.

Reversed and remanded.

APPENDIX C

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NO. 94-C-777-B

BEULAH B. WOOTON,
Administratrix of the Estate of
ROBERT O. WOOTON,
Plaintiff,

vs.

DARRYL J. ROBERTS and
LEGACY ONE, INC., (f/k/a
ASSOCIATED CEMETERY
ESTATES, INC.,
Defendant.

VOLUME III

Transcript of the trial of the above-styled Civil Action on Thursday, March 26, 1998, commencing at 9:04 a.m., at the Raleigh County Courthouse, Beckley, West Virginia, before The Honorable Robert A. Burnside, Jr., Judge, and a jury.

APPEARANCES:

Plaintiff Beulah B. Wooton, in person and by counsel:

DEBRA L. HAMILTON, ESQUIRE, and
JOSHUA I. BARRETT, ESQUIRE,
DiTrapano & Jackson
604 Virginia Street
Charleston, West Virginia 25301

Defendant Darryl J. Roberts, in person and by counsel:

DAVID A. BARNETTE, ESQUIRE,
Jackson & Kelly PLLC
Post Office Box 553
Charleston, West Virginia 25322-0553

Defendant Legacy One, Inc., by counsel:

JOHN J. NESIUS, ESQUIRE,
Spilman, Thomas & Battle
Post Office Box 273
Charleston, West Virginia 25321-0273

Carol G. Ackison
Official Court Reporter

Circuit Court Transcript of Trial - 3/26/98

[Order Directing Verdict in Favor of Defendants]

Trial Transcript at pp. 217-222.

THE COURT: . . . . Now, the entire genesis of this cause of action is grounded in events – in that event of March 25, 1972, when the transfer of the shares of Mr. Wooton's stock was directed by Chester Roberts to be made by the corporate secretary to him. That is the moment which Mr. Wooton's estate was divested of – if at all, if they were divested, that's when it happened.

There was correspondence of 1971 and a check that predated that event in 1972, but that is not terribly significant because it served only to put Mrs. Wooton on notice that Mr. Wooton had been in default. Knowledge of a default is not equivalent to knowledge of what amounted to a foreclosure or a transfer that happened later in 1972. So 1972, March 25th, is the critical date, and that is when the cause of action arose. Under the facts presented, that cause of action would have to be based on the premise that the transfer was wrongful because there had been no default or void because there had been no default, or if the transfer was correct, there would be a cause of action in some form for an accounting for the excess of the value of the shares over the amount remaining on the debt. And there existed at that time, I believe, valid issues over those things, over whether there had been a default, and if so, what type of accounting would be necessary. There is some uncertainty as to, even using the contract, as to how you would make that calculation. So there were valid issues existing then about that.

Mr. Roberts, Chester Roberts, from this evidence in this case obviously was a prudent businessman, he ran his company well. He, as they say now, he grew it well. How "grew" turned into a transitive verb, it did; but, anyway, he made it develop and he was a good manager, but, unfortunately, it looks to me like this thing wasn't done well, and some issues remain over whether there was a default and how much, if anything, was due, if there had been a default and the transfer was correct.

Now, the critical point here, though, is whether Mrs. Wooton, as a representative of the Wooton estate, was on notice that the transfer had occurred, and I think that the evidence in this case has to be yes, but there is no issue about that. From 1972 forward, she did not enjoy any of the benefits associated with possession of this stock. There is no dispute that she never received notice of a shareholder's meeting, she never received any dividend checks, either written to her or to her husband's estate. Nothing. She had nothing that would indicate ownership or possession, none of the elements or actions or things that go with that.

Now the question has been raised as to the impact of not receiving dividends and the arguments made that really that shouldn't mean much because she thought that dividends were somehow just applied to the note and reduced the note, and so she'd never see a dividend. That clearly – if she thought that, that was a mistake as to the clear terms of the contract. The contract doesn't say so. The parol evidence rule would prevent her from raising that claim even then or now, had she raised it in 1972 or 1973. That mistake by her, assuming she made the mistake, and I'll resolve that issue of fact for the Plaintiff, she really, honestly thought that, that

does not create an issue of fact, though, as to whether or not the absence of dividends meant something to her, put her on notice of something. Defendants cited to some case law, the effect of which is to say that the lack of action or lack of interest or maybe even a misunderstanding of why she had does not, standing alone, create a discovery issue.

There is no doubt at all that, in 1972, Mrs. Wooton was busy, overwhelmed perhaps, with the duties she had as a what we now call a single mother. I guess we had a different term for her situation then, but it was a severe situation, but, unfortunately, the law doesn't say that being busy or being overwhelmed or being diverted from attending to the business at hand excuses or invokes the discovery rule. I don't think there is an issue of fact, then, that by the failure to receive dividends or notices or the other indicia of ownership of corporate stock that she was on notice that something had happened, something had happened, and that something, whatever that was, ended those elements or indicia of ownership. Yet nothing was done.

From 1972 to 1995, apparently no attention, or insufficient attention was given to it and in 1985 – I'm sorry, 1972 to 1985 insufficient attention was given to it. Mr. Wooton, William Wooton, then raised the issue with Darryl Roberts. During those 13 years, Chester Roberts had died and Darryl was now in his place and Darryl Roberts had to figure it out by looking into the records. The evidence indicates that. What Darryl had to figure out is neither here not there for the purposes of whether there is an issue of fact. There is no issue of fact on the point that Mrs. Wooton had sufficient information in 1972 to know that something had happened. Something had happened to cause her not to have

the enjoyment of possession of this stock. Thirteen years later, serious inquiries began to be made, but that was 13 years later.

Now, accepting Plaintiff's evidence on this point, that the only agent acting for Mrs. Wooton or the family or the estate was Jim Wooton, in Baltimore, I have to accept that for purposes of directed verdict. Jim Wooton knew the same things that Mrs. Wooton knew. He knew there had been no dividends paid in those years, no shareholder notices. He also had the benefit of this letter which says something about repurchase. Now that's a term we don't know what it means. It's a term that could mean a couple of things, but it indicates that Mr. Roberts had done something that affected these shares. That is a notice, that's knowledge that is counter to the application of the discovery rule.

Jim Wooton knew enough, he had enough information then to know that either Chester Roberts or the corporation had done something. You don't have to know every element of your cause of action or know that you have enough to win in order to be charged with the running of the statute of limitations. The discovery rule runs the other direction. If fraud had occurred, if a squeeze out had occurred, a conversion or a theft or whatever, it happened in 1972. Gaither v. City Hospital, 199 W.Va. 706, a 1997 case, there is nothing new about it, but it carries forward it a lot of existing precedent: The discovery rule applies to all tort actions or all actions like this. In 712, mere ignorance of the existence of a cause of action or the identity of the wrongdoer does not prevent running of the statute of limitations. The discovery rule applies only when there is a strong showing by the Plaintiff that some action by the Defendant, some action

by the Defendant, prevented her from knowing of the wrong at the time of the injury. In Statler v. Bailey, 184 W.Va. 212, mere silence by the wrongdoer is not enough unless he has done something to prevent the Plaintiff from discovering the wrong.

The Plaintiff has not offered sufficient evidence to create an issue of fact as to whether the Defendant or Chester Roberts, I'm sorry, the Defendant acting in someway as a successor to Chester Roberts, or the Defendant himself, or the Defendant corporation, did something to prevent her from knowing or finding out or preventing her son, Jim Wooton, from finding out what had happened to her husband's stock in 1972.

In the absence of an issue of fact that would permit the application of the discovery rule, no other issues remain, and so I am compelled under the state of the evidence to grant the directed verdict for both Defendants on all counts.

That concludes my announcement of the ruling on the motions for directed verdict. Plaintiff certainly will have your exceptions preserved to the extent that is necessary for you to take the matter up. I will now bring out the jury and instruct them that the matter has been resolved.

APPENDIX D

[Dated May 28, 1996]

AGREEMENT

AGREEMENT, dated this 28th day of May, 1986, by and between LEGACY ONE, INC., a corporation organized and existing under the laws of the State of West Virginia hereinafter referred to as "Corporation" and Estate of Chester Roberts, Marzetta Roberts, Darryl Roberts, Shelby Roberts, Mary Frances Roop, Paul W. Roop, Boyd E. Terry, David A. Whitener, Joe R. Smith, Ann Roberts, Adam Roberts, James A. Safewright, James F. Safewright, Robert A. Goss, Estate of Leah Tony Trail, Donal Meadows, Bill Wooten, Roger Pauley, individual Shareholders, hereinafter referred to as "Shareholders".

W I T N E S S E T H:

WHEREAS, the "Shareholders" are the owners of all the capital stock of the Corporation and hold the stock as follows:

Estate of Chester Roberts	8,778.43 shares
Marzetta Roberts	3,141.74 shares
Darryl Roberts	2,541.52 shares
Shelby Roberts	78.40 shares
Mary Frances Roop	549.81 shares
Paul W. Roop	305.29 shares
Boyd E. Terry	211.63 shares
David A. Whitener	196.80 shares

Joe R. Smith	185.69 shares
Ann Roberts	18.50 shares
Adam Roberts	18.50 shares
James A. Safewright	2.97 shares
James F. Safewright	15.76 shares
Robert A. Goss	15.76 shares
Estate of Leah Tony Trail	3.93 shares
Donal Meadows	15.76 shares
Bill Wooten	9.25 shares
Roger Pauley	100.00 shares
Treasury	194.95 shares
TOTAL SHARES:	16,384.69

WHEREAS, the Corporation and the Shareholders are agreed that the success of the Corporation requires an active interest, support and attention of its shareholders and that for this reason it is advisable to prevent its shares to go upon the open market for sale; and

WHEREAS, all the parties hereto are opposed to the introduction into the ownership of the Corporation of strangers not willing and able to contribute in like manner to the success of the Corporation and desire to restrict the privilege of owning shares in the Corporation.

. . . .

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

. . . .

/s/ William R. Wooton

Bill Wooten, stockholder

STATE OF WEST VIRGINIA

COUNTY OF RALEIGH, TO-WIT:

I, Cindy L. Cook, a Notary Public in and for said county and state, do hereby certify that William R. Wooton, whose name is signed to the foregoing writing bearing date the 28th day of May, 1986, has this day acknowledged the same before me in my said county.

Given under my hand this 3rd day of June, 1986.

My commission expires:

/s/ Cindy L. Crook
Notary Public
Commissioned as Cindy L. Linville

APPENDIX E

[Dated January 21, 1985]

ASSOCIATED CEMETERY ESTATES, INC.
300 NORTH KANAWHA STREET
P. O. BOX 1586 - PHONE 304-255-0505
BECKLEY, WEST VIRGINIA 25801

January 21, 1985

Mr. William R. Wooton
WOOTON, WOOTON & FRAGILE
P. O. Box 1733
Beckley, WV 25801

Dear Bill:

I have attempted to research the rationalism behind the repurchase of your father's stock in 1969. From what I have learned, various people wanted to purchase shares of A.C.E. stock. Those shares were to be purchased out of dividends from the corporation and they were secured by a note to Chester Roberts. In your father's instance, at the time of his death, he had not made the principal and interest payments as scheduled. After his death, a calculation was made to

determine the value of the stock. They subtracted the amount owed on the note from that value and wrote your mother a check for $4,000, which, as you well know, was never cashed.

It seems that the most reasonable position to take at this time is that we will pay your mother the $4,000 as we agreed to do in 1969, and on top of that, we will pay her an average interest rate of 5% per year for the fifteen years since that time. This amounts to $8,315.71. If this is satisfactory with you and your mother, please let me know and we will issue the check within thirty (30) days.

Yours truly,

ASSOCIATED CEMETERY ESTATES, INC.

_____

/s/ Darryl J. Roberts
President

DJR:nkg